COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

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| KENNETH FORBES, | ) |
| | )4 Civil 27366 |
| Plaintiff and Appellant, | )(Super. Ct. No. |
| | ) 199833) |
| v. | ) |
| | )O P I N I O N |
| ROBERT C. NEWMAN, II, | ) |
| | ) |
| Defendant and Respondent. | ) |
| | ) |

APPEAL from the Superior Court of San Bernardino County. Don A. Turner, Judge. Reversed.

S. Myron Klarfeld for Plaintiff and Appellant.

Roberts & Morgan and Roger P. Martin for Defendant and Respondent.

THE COURT*

Plaintiff, Forbes, appeals from a judgment of dismissal entered after a demurrer had been sustained without leave to amend.

Before us is Forbes' third amended

*Morris, P.J., McDaniel, J., Trotter, J.

complaint. In 12 counts it sought general and punitive damages against Newman who was Forbes' psychologist. According to the complaint, Forbes voluntarily engaged in therapy with Newman commencing on April 2, 1979.

Forbes pleaded that on November 14, 1980, he learned for the first time that Newman had reported to a child protective agency that Forbes had a "vague sexual involvement" with his "daughter." A variety of damages were alleged to flow from this disclosure. Forbes pleaded he was tried and acquitted of criminal charges, lost custody of his children, was unable to work and so forth.

Newman takes the position that he has an absolute immunity to this civil action under the provisions of Penal Code sections 11165 through 11174 which require licensed psychologists, among others, to report instances of suspected child abuse learned

during the course of professional employment.

The two most basic questions raised on this appeal concern whether there is absolute immunity for Newman and whether Newman was under a duty to warn Forbes of the possibility arising that Newman would be required to report suspected instances of child abuse.

The first six causes of action are generally directed at negligent and intentional disclosure of confidential information to the authorities by Newman. The last six cause of action are built upon the concept that Newman had a duty to give Forbes warnings similar to Miranda warnings and that Newman breached that duty when he failed to warn Forbes of exceptions to the confidentiality of their relationship.[1/]

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1/ The following are Forbes characterizations of the counts as they appear in the third amended complaint:

First: "Negligence - failing to act reasonably to maintain the confidentiality of the psychotherapist-client relationship."

Neither party attempts to justify or attack the specific elements of any one of the 12 causes of action. The complaint is obviously based upon creative pleading and we will not engage in an element by element and count by count review where the parties have not done so either here or before the trial court.

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(Fn. 1 cont.)

Second: "Intentional Infliction of Emotional Distress - due to intentional breach of confidential relationship."
Third: "Invasion of Privacy - negligently failing to act reasonably."
Fourth: "Intentional Invasion of Privacy."
Fifth: "Violation of civil rights by failing to act reasonably."
Sixth: "Intentional Violation of Civil Rights."
Seventh: "Negligence due to Defendants failure to warn Plaintiff."
Eighth: "Intentional Infliction of Emotional Distress - based on intentional failure to warn."
Ninth: "Invasion of Privacy - failure to warn."
Tenth: "Intentional Invasion of Privacy - failure to warn."
Eleventh: "Violation of Civil Rights - failure to warn."
Twelfth: "Intentional Violation of Civil Rights - failure to warn."

Immunity rather than Forbes' creative causes of action is the focal dispositive point at this stage of the litigation. Basically it is Forbes' position that he successfully pleaded around any immunity bar. Forbes argues that the trial court determined a factual issue at the demurrer stage when it found absolute immunity. Forbes correctly argues that in order for the court to find immunity at this stage it impliedly concluded that Newman acted reasonably in making his report to the authorities. The first cause of action, for example, was a negligence count and included that Newman "unreasonably, without just cause and without right, reported . . . and wrongfully (characterized) said disclosure as a 'vague sexual involvement' . . ." The gist of the allegation was that Newman's disclosure was without legal justification. As we shall subsequently explain, Newman only has immunity where his disclosure is based upon reasonableness.

Newman argues that the complaint is inadequate because it does not plead enough specific facts to give him notice of the acts upon which his liability is allegedly based. Newman's brief recites: "The complaint . . . does not set forth those facts which (Newman) relied upon in reaching his conclusion to report the sexual involvement of (Forbes) with his stepdaughter. A cause of action must advise the defendant of the circumstances which give rise to unreasonable behavior." Newman cites no legal authorities on this general pleading question.

As we understand the complaint, it alleges that Newman made a child abuse report without an adequate basis for doing so. As we understand Newman's argument, he believes the complaint should set forth specific factual sections covering the disclosures made by Forbes upon which Newman relied. It is Newman, not Forbes, who possesses the knowl-

edge concerning what matters were relied upon in making the report.[2/] Without further explanation by Newman and the citation of supporting legal authorities it is unnecessary for us to further explore Newman's position on appeal. Forbes pleaded that the report was made and that it was done without justification and right. This adequately serves as notice to Newman. To delve further moves into the arena of discovery.

We now turn to the question of immunity. Penal Code Section 11166 requires licensed phychologists to report suspected instances of child abuse and Penal Code section 11172 provides for both civil and criminal immunity for doing so.

Penal Code section 11166, subdivision

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2/ There are some flaws inherent in Newman's position. For instance, had Newman created the facts of child abuse from his own imagination rather than from his counseling with Forbes, what facts could Forbes set forth to satisfy Newman's position? What would Forbes plead if Newman's report was based upon expert professional evaluations rather than blunt disclosures by Forbes? Is Forbes prevented from getting beyond the pleading stage simply by not knowing exactly what Newman relied upon in arriving at his opinion? We think not.

(a), provides, in part: "(a) . . . any . . . medical practitioner . . . who has knowledge of . . . a child in his . . . professional capacity or within the scope of his . . . employment whom he . . . reasonably suspects has been the victim of child abuse shall report the . . . suspected instance of child abuse . . . ."(Emphasis added.) Similarly, Penal Code section 11166, subdivision (b), provides, in part: "(b) Any . . . medical practitioner . . . who reasonably suspects that mental suffering has been inflicted on a child or his . . . emotional well-being is endangered in any other way, may report such . . . suspected instance of child abuse . . . ." (Emphasis added.)

Penal Code section 11172 provides for immunity, as follows: "No . . . medical practitioner . . . who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article. Any

other person reporting a . . . suspected instance of child abuse shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false . . . ." (Emphasis added.)

Immunity exists where the report is made because required or authorized by the reporting statute. Where a psychologist knows or reasonably suspects child abuse, he is immune from liability for making the report. In contrast, Forbes' complaint pleads that Newman's report was "without right" which imparts the meaning that it was beyond the immunity protection. Forbes pleaded that disclosure was "without just cause" which can impart the meaning that Newman lacked actual knowledge of child abuse. This latter matter is also established from the complaint by the fact Newman gained his knowledge from Forbes rather than the child. Newman's immunity would rest

on his reasonable suspicion of child abuse but the complaint adequately pleads around this by providing that the report was made "unreasonably" and "wrongfully."

If we assume that the current statutory language is applicable here, it grants immunity for a report "required or authorized" by the statutory scheme. In turn, section 11166 allows or demands reporting where the person reporting knows or "reasonably suspects" child abuse. According to the complaint, liability is based upon the secondary knowledge acquired through therapy and therefore brings into play the "reasonably suspects" portion of the statute.

The complaint alleged that the disclosure was unreasonable and wrongful. Section 11166 defines "reasonable suspicion" as "objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training

and experience, to suspect child abuse."

Reasonableness is a question of fact arising from the complaint. Without resolution of this fact it cannot be determined that immunity applied here. Consequently, we agree that the court impliedly made a determination of fact in ruling on the demurrer.

While the language in the complaint may not be artful, it does avoid the bar of immunity on its face. We do not suggest that immunity may not exist, we only conclude that the complaint does not show the immunity bar on its face.

Forbes has argued that the current provisions of the child abuse reporting statutes are not the ones to be applied because the report predated the present sections. As we understand it, former Penal Code section 11161.6 was applicable at the time of the report. It provided, in part: "In any case in which a minor is brought to a . . . psychologist . . . and it appears to the

. . . psychologist . . . from observation of the minor that the minor has physical . . . injuries which appear to have been inflicted upon him by other than accidental means by any person, that the minor has been sexually molested, . . . he shall report . . . ."

The former statutory language on its face states that the minor had to be "brought to" the psychologist who had to make an "observation of" the minor in order to trigger the reporting statute. The reporting under the statute could not be the basis of civil or criminal liability "unless it can be proven that a false report was made and the person knew or should have known that the report was false." (Former Pen. Code, Section 11161.5.)

At the time Newman made the report, which was prior to November 14, 1980, actual observation of the child appears to be a requirement. As the complaint is drafted it is based upon a report derived on counseling with Forbes

rather than from observation of the child. Thus, the statutory immunity in effect at the time did not, on its face, show its application to Newman under the circumstances described in Forbes' complaint.

In enacting the present law and repealing former Penal Code section 11161.5, the Legislature specifically declared: "In reenacting the child abuse reporting law, it is the intent of the Legislature to clarify the duties and responsibilities of those who are required to report child abuse." From this Newman argues that the present law and the former law are the same. Despite the legislative declaration, it remains that the former statutory provision dealt with situations of actual observation of the victim. (See: Landeros v. Flood, 17 Cal. 3d 399, 407.)

In reviewing the former statute, the Supreme Court in Landeros stated, in essence, that a medical practitioner did not violate his reporting duties unless it could be proven that the doctor "actually observed" the in-

juries "and former the opinion they were intentionally inflicted . . ." (At p. 415.)[3/]

Whether present and former law are the same or different is of no consequence to our resolution. The briefing on this appeal is inadequate to resolve the very serious question of immunity under the former law, particularly on a review at the pleading stage. Because the complaint is adequately pleaded to avoid the immunity bar under present statutory law, we need not resolve the scope of the statutory law as it existed at the time of the report. If and when the parties must again face that question, we trust that they will go beyond the face of the statute and the

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3/ The medical practitioner is in a difficult position. If he fails to report he may be criminally prosecuted (Pen. Code, Section 11172, subd. (a)) and sued by the victim (Landeros v. Flood, supra). If he reports he then faces the initiation of the type of lawsuit before us. While immunity may ultimately attach, it can be an expensive venture in getting to that point.

general intent language of the Legislature.

We think it best to comment on Forbes' last six cause of action. Forbes contends that Newman had a duty to warn Forbes that communications between them might be reported to authorities and might result in criminal proceedings against Forbes. Forbes contends that Newman was required to observe all the constitutional safeguards which must be observed by law enforcement officials. Forbes says his psychologist was an agent of the state because state law requires the psychologist to report instances of child abuse learned in the confidential relationship with the patient.

Forbes' sole case authority for a duty to warn is Estelle v. Smith, 451 U.S. 454 (68 L.Ed.2d 359, 101 S.Ct. 1866). Estelle concerned a psychiatric evaluation of a defendant charged with murder to determine whether he was competent to stand trial. The

prosecution was directed by the court to arrange the examination and no notice was given to defense counsel. Subsequently, the psychiatrist, based on the competency examination, testified against defendant at the penalty phase of trial. That testimony substantially supplied necessary evidence for imposition of the death penalty.

The United States Supreme Court found both Fifth and Sixth Amendment violations. For instance, the defendant was not given Miranda warnings at the inception of the psychiatric interview. Estelle concerns the rights of an accused who has been charged with a crime and is represented by counsel. It deals with the admissibility of evidence against the accused in criminal proceedings.

Estelle does not begin to approach the circumstances before us. It is inapposite. Forbes also generally refers to the existence of Evidence Code sections 1010 through 1014. These sections set forth the psychotherapist-

patient privilege. Forbes does not explore these code sections nor does he interrelate them to the statutory requirement of disclosing cases of child abuse.

Forbes does not consider whether suppression of evidence in a criminal proceeding might be a complete remedy, assuming a duty to warn existed in the first instance. Forbes does not consider the applicability in civil proceedings of rules developed and used in criminal prosecutions. Forbes does not consider the interrelationship of his general position with the strong public policy to protect children from abuse. Forbes does not consider the effect of the fact that his relationship with Newman was a voluntary one. He does not consider the ramifications on psychological therapy if warnings are required before the commencement of all therapeutical sessions.

Forbes has failed to present adequate briefing to shoulder his burden as an appellant to demonstrate the trial court erred.

He has not demonstrated that there is a duty to warn under the circumstances here nor has he demonstrated the existence of a civil cause of action based upon a failure to warn.

We reverse the judgment of dismissal of the first six counts because none were pleaded in a manner which affirmativly demonstrated the immunity bar on their face. The remaining counts have not been shown to have a legal foundation.

The trial court is directed to vacate its order sustaining Newman's demurrer without leave to amend as to the first six causes of action only. The judgment of dismissal is reversed.

(Not to be published in official reports)

SUPREME COURT

FILED

October 27, 1982

Laurence P. Gill,
Clerk

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 2, Civil No. 27366

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

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FORBES

v.

NEWMAN II

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Appellant's petition for hearing DENIED.

The request for an order directing publication of the opinion in the above entitled cause is DENIED.

BIRD
Chief Justice

SECTION 11166, CALIFORNIA PENAL CODE
(In Pertinent Part)

"(a) Except as provided in subdivision (b), any child care custodian, medical practitioner, nonmedical practioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident. For the purposes of this article, "reasonable suspicion" means that it is objectively reasonable for a person to entertain such a suspicion, based upon the facts that could cause a reasonable person in a like position,

drawing when appropriate on his or her training and experience, to suspect child abuse.

(b) Any child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who has knowledge of or who reasonably suspects that mental suffering has been inflicted on a child or his or her emotional well-being is endangered in any other way, may report such known or suspected instance of child abuse to a child protective agency."

SECTION 11172, CALIFORNIA PENAL CODE

"(a) No child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article. Any other person reporting a known or suspected instance of child abuse shall not incur civil or criminal liability as a result

of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false. No person required to make a report pursuant to this article, nor any person taking photographs at his or her direction, shall incur any civil or criminal liability for taking photographs of a suspected victim of child abuse, or causing photographs to be taken of a suspected victim of child abuse, without parental consent, or for disseminating the photographs with the reports required by this article. However, the provisions of this section shall not be construed to grant immunity from such liability with respect to any other use of the photographs.

(b) Any person who fails to report an instance of child abuse which he or she knows to exist or reasonably should know to exist, as required by this article, is guilty

of a misdemeanor and is punishable by confinement in the county jail for a term not to exceed six months or by a fine of not more than five hundred dollars ($500)or by both."